

MEMORANDUM

TO: Committee to Revise the Uniform Health Care Decisions Act
FROM: Nina Kohn, Reporter
DATE: March 8, 2023
RE: Issues for the Committee's Consideration

At this week's meeting, we will work through the draft Uniform Health Care Decisions Act section by section. While your thoughts are critical on all parts of the draft, this highlights some sections on which the Committee Chair and I believe thoughts from Committee members and observers would be especially important.

1. Section 2: We encourage participants to review all definitions in this section, but direct attention specially to:

- The new defined term "has capacity,"
- The new defined term "nursing home," and
- The new definition of "person interested in the welfare," which replaces the increasingly ambiguous language "law or by blood" with a specific definition in 18(A).

2. Sections 3-6: These sections have the most significant changes since the last draft. As such, participants are encouraged to read them carefully. Here is a brief overview of how these sections work together:

- Section 3 states that there is a presumption of capacity as before, but now integrates this with a statement as to what must be shown to rebut the presumption.
- Section 4 has been substantially reworked to clarify the role of courts. It specifies that a presumption under Section 3 can be rebutted by a court determination or by a finding by a medical professional as set forth in Section 4.
- Section 5 enables a patient to object to a finding under Section 4 and explains the effect of that objection.
- Section 6 then makes it clear that a person can always challenge a provider's finding regarding capacity in a court of law. Representation is important here, but states have a choice as to whether to provide legal counsel or a guardian ad litem. The past draft only referred to a guardian ad litem, but notice was taken that legal counsel would be even better should states wish to invest in it.

As part of the consideration of these sections, we encourage discussion of the language "expertise and training" now in Section 4. We have had a number of queries as to how expertise and training are to be determined. We therefore left this language in for allied professionals, but moved to the comments for physicians.

3. Section 9(d): Over the course of our work as a Committee, we have considered to what extent advance directives for mental health care should be treated any differently from a person

with a general advance directive. As part of this, there have been discussions of “Ulysses clauses” and what they could entail. In this version, the Act makes one distinction: it allows an individual in an advance directive for mental health care to direct that a single finding of incapacity is sufficient to rebut the presumption of capacity even if, at the time of that finding, the individual objects to it. We would appreciate specific feedback on this approach.

4. Section 11: The optional form has been substantially shortened and simplified with the assistance of a plain language expert with decades of high-level experience with whom the ULC contracted. As part of this, some items have been removed. One was a section in which a person could nominate a guardian, which was seen as (1) not essential, (2) confusing without an explanation of guardianship, and (3) having the potential to lead people to believe that guardianship is routine practice (and not the extraordinary, last resort intervention it should be). Another that was removed was guidance to providers regarding the effect of a copy as it seemed not essential. A key question for this Committee is whether there are other things that should be eliminated.

5. Section 16: Much of this section is new, so participants are encouraged to read it carefully so we can have a robust discussion.

6. Section 18: We would like to call the participants’ attention to the hot powers. We would especially like to tee up whether consent to research that risks more than a little harm should be a hot power (as opposed to, perhaps, something that is impermissible).